

as

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF KANSAS**

<b>DAVID SHAMBLIN,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 03-1358-JAR</b>
	)	
<b>JO ANNE B. BARNHART, Commissioner of</b>	)	
<b>Social Security,</b>	)	
	)	
<b>Defendant.</b>	)	
_____	)	

**MEMORANDUM & ORDER**

Plaintiff David Shamblin brings this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of Defendant Commissioner of Social Security's denial of his application for a period of supplemental security income under Title XVI of the Social Security Act. According to plaintiff, defendant failed to properly assess plaintiff's credibility, failed to adequately develop the record regarding whether plaintiff's impairments met or equaled a Listed Impairment, and did not properly determine plaintiff's residual functional capacity. As explained in more detail below, the Court concludes that the decision, in part, is based on insubstantial evidence and/or on an incorrect application of the law, and therefore the Court reverses and remands this case.

**I. Procedural Background**

On October 11, 2001, plaintiff protectively filed an application for a period of supplemental security income, claiming disability since February 1, 1998, due to pain in his back, legs, elbows,

knees, and hands. The application was denied both initially and upon reconsideration. After a hearing at which plaintiff and his counsel were present, an administrative law judge (ALJ) denied all benefits on June 18, 2003, on the basis that plaintiff was not under a “disability” as defined by the Social Security Act. Plaintiff’s request for review was denied by the Appeals Council on September 17, 2003. Thus, the ALJ’s decision is the final decision of defendant.

Plaintiff previously filed an application for supplemental security income on May 22, 2000. That claim was denied initially and no request for reconsideration was filed. The ALJ determined that because plaintiff was found not disabled based on that claim, there was no basis to consider reopening or revising that determination.

## **II. Standard of Review**

Judicial review under 42 U.S.C. § 405(g) is limited to whether defendant’s decision is supported by substantial evidence in the record as a whole and whether defendant applied the correct legal standards.<sup>1</sup> The Tenth Circuit has defined “substantial evidence” as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>2</sup> In the course of its review, the court may not reweigh the evidence or substitute its judgment for that of defendant.<sup>3</sup>

## **III. Relevant Framework for Analyzing Claim of Disability and the ALJ’s Findings**

“Disability” is defined in the Social Security Act as the “inability to engage in any substantial

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<sup>1</sup>See *White v. Massanari*, 271 F.3d 1256, 1257 (10th Cir. 2001) (citing *Castellano v. Sec’y of Health & Human Servs.*, 26 F.3d 1027, 1029 (10th Cir. 1994)).

<sup>2</sup>*Id.* (quoting *Castellano*, 26 F.3d at 1028).

<sup>3</sup>*Id.*

gainful activity by reason of any medically determinable physical or mental impairment . . . .”<sup>4</sup> The Social Security Act further provides that an individual “shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . .”<sup>5</sup>

The Social Security Administration has established a five-step sequential evaluation process for determining whether a claimant is disabled,<sup>6</sup> and the ALJ in this case followed the five-step process. If a determination can be made at any of the steps that a claimant is or is not disabled, evaluation under a subsequent step is not necessary.<sup>7</sup> At step one the ALJ determines whether the claimant is presently engaged in substantial gainful activity.<sup>8</sup> If he is, disability benefits are denied.<sup>9</sup> If he is not, the ALJ must proceed to the second step.<sup>10</sup> Here, the ALJ determined that plaintiff was not engaged in substantial gainful activity and, thus, properly proceeded to the second step.

The second step of the evaluation process involves a determination of whether “the claimant has

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<sup>4</sup>*Williams v. Bowen*, 844 F.2d 748, 750 (10th Cir. 1988) (quoting 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1982)).

<sup>5</sup>*Id.* (quoting 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B) (1982 & Supp. III 1985)).

<sup>6</sup>*See id.* (citing 20 C.F.R. §§ 404.1520, 416.920 (1986)).

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

a medically severe impairment or combination of impairments.”<sup>11</sup> This determination is governed by certain “severity regulations,” is based on medical factors alone, and consequently, does not include consideration of such vocational factors as age, education, and work experience.<sup>12</sup> Pursuant to the severity regulations, the claimant must make a threshold showing that his medically determinable impairment or combination of impairments significantly limits his ability to do basic work activities.<sup>13</sup> If the claimant is unable to show that his impairments would have more than a minimal effect on his ability to do basic work activities, he is not eligible for disability benefits.<sup>14</sup> If, on the other hand, the claimant presents medical evidence and makes the de minimis showing of medical severity, the ALJ proceeds to step three.<sup>15</sup> The ALJ in this case concluded that plaintiff’s degenerative disc disease of the lumbar spine with disc bulges and narrowing satisfied the severity requirement and, thus, the ALJ proceeded to step three. However the ALJ determined that plaintiff did not have a severe mental impairment, and that there was no evidence of any pain in his elbow, hand, and knee.

At step three, the ALJ “determines whether the impairment is equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity.”<sup>16</sup> If the impairment is listed and thus conclusively presumed to be disabling, the claimant is

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<sup>11</sup>*Id.* (quoting *Bowen v. Yuckert*, 482 U.S. 137, 140-41 (1987)).

<sup>12</sup>*Id.* (citing 20 C.F.R. §§ 404.1520(c), 416.920(c) (1986)).

<sup>13</sup>*Id.* at 750-51 (citing 20 C.F.R. §§ 404.1521(b), 416.921(b) (1986)).

<sup>14</sup>*Id.* at 751.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* (citing 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986); *Bowen v. Yuckert*, 482 U.S. at 141).

entitled to benefits.<sup>17</sup> If not, the evaluation proceeds to the fourth step, where the claimant must show that the “impairment prevents [the claimant] from performing work he has performed in the past.”<sup>18</sup> If the claimant is able to perform his previous work, he is not disabled.<sup>19</sup> With respect to the third step of the process in this case, the ALJ determined that plaintiff’s impairments were not listed or medically equivalent to those listed in the relevant regulations. At the fourth step, the ALJ concluded that plaintiff was unable to perform his past relevant work.

Thus, the ALJ proceeded to the fifth and final step of the sequential evaluation process—determining whether the claimant has the residual functional capacity (RFC) “to perform other work in the national economy in view of his age, education, and work experience.”<sup>20</sup> At that point, the ALJ properly shifted the burden of proof to defendant to establish that plaintiff retains the capacity “to perform an alternative work activity and that this specific type of job exists in the national economy.”<sup>21</sup> At this step, the ALJ concluded that plaintiff was not disabled, finding that plaintiff, despite possessing certain limitations, nonetheless could perform some light or sedentary unskilled work, including photocopy machine operator, of which there were a significant number of jobs in the state and national economies.

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<sup>17</sup>*Id.*

<sup>18</sup>*Id.* (citing 20 C.F.R. §§ 404.1520(e), 416.920(e) (1986); *Bowen v. Yuckert*, 482 U.S. at 141).

<sup>19</sup>*Id.*

<sup>20</sup>*See id.* (quoting *Bowen v. Yuckert*, 482 U.S. at 142).

<sup>21</sup>*See id.* (citations omitted); *accord White*, 271 F.3d at 1258 (at fifth step, burden of proof shifts to Commissioner to show that claimant retains the functional capacity to do specific jobs).

#### **IV. Analysis of Plaintiff's Specific Arguments**

Plaintiff contends that the ALJ failed to: (1) adequately develop the record regarding whether plaintiff's impairments met or equaled a Listed Impairment; (2) properly assess plaintiff's credibility; and (3) support his determination of plaintiff's RFC with substantial evidence. The Court addresses each of these arguments in turn.

##### *A. ALJ's Duty to Develop the Record Regarding Plaintiff's Mental Impairment*

Plaintiff argues that the ALJ failed to fulfill his duty to develop the record by not ordering an IQ test to determine whether plaintiff met Listing 12.05C. Before this argument may be addressed, the Court must address the argument it necessarily raises—whether the ALJ properly determined that plaintiff did not have a severe mental impairment. The ALJ included mental limitations in plaintiff's RFC. If these limitations were severe enough to be included in RFC, they obviously had more than a minimal effect on his ability to do basic work activities. Thus, the ALJ improperly determined that plaintiff did not have a severe mental impairment.

The ALJ agreed with the State agency medical consultants who determined that plaintiff's dysthymia caused mild restrictions in: activities of daily living; maintaining social functioning; and maintaining concentration, persistence, or pace and no episodes of decompensation in work or work-like settings. While this characterization of plaintiff's dysthymia is consistent with a finding of not severe, the State agency physician relied on the opinion of a psychologist who did not perform any mental status testing on plaintiff. Furthermore, there was no determination with regard to any of the other mental limitations for which there is evidence in the record.

Listing 12.05C—Mental Retardation, which plaintiff believes he might meet, requires that

claimant have “[a] valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function.”<sup>22</sup>

Although the record contains a consultative mental exam, the examiner did not give plaintiff an IQ test.

The ALJ has a duty to ensure that an “adequate record is developed during the disability hearing consistent with the issues raised.”<sup>23</sup> Plaintiff bears the burden of proving disability, and to meet this burden, plaintiff must provide the ALJ with evidence of the existence of a disability.<sup>24</sup> However, these disability hearings are non-adversarial, and the ALJ bears responsibility for determining that the record is adequately developed.<sup>25</sup> This duty applies even where, as here, plaintiff is represented by counsel.<sup>26</sup>

The issue plaintiff presents is not whether the ALJ failed to obtain a record already in existence, but whether the ALJ should have ordered an IQ test to complete the record. In the Tenth Circuit, a claimant must first establish some quantum of evidence of a disabling impairment before the ALJ will be required to further develop the record.<sup>27</sup> The Tenth Circuit has determined that “the starting place must

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<sup>22</sup>Appendix 1, Subpart P of 20 C.F.R. Part 404 § 12.05C.

<sup>23</sup>*See Hawkins v. Chater*, 113 F.3d 1162, 1164 (10th Cir. 1997) (citing *Henrie v. U.S. Dept. of Health & Human Servs.*, 13 F.3d 359, 360-61 (10th Cir. 1993); 20 C.F.R. § 404.944)); *see also Heckler v. Campbell*, 461 U.S. 458, 471 n. 1 (1983).

<sup>24</sup>*Arteaga v. Barnhart*, No. 03-7099, 2004 WL 1127191, \*3 (10th Cir. May 21, 2004) (citing *Bowen v. Yuckert*, 482 U.S. at 146). Pursuant to 10th Cir. Rule 36.3(B)(1), the court cites this unpublished opinion for its persuasive value.

<sup>25</sup>*Id.* (citing *Henrie*, 13 F.3d at 360-61).

<sup>26</sup>*Graham v. Apfel*, No. 97-6373, 1998 WL 321215, \*1 (10th Cir. June 5, 1998) (citing *Baca v. Dep’t of Health & Human Servs.*, 5 F.3d 476, 480 (10th Cir. 1993)). Pursuant to 10th Cir. Rule 36.3(B)(1), the court cites this unpublished opinion for its persuasive value.

<sup>27</sup>*Hawkins*, 113 F.3d at 1166.

be the presence of some objective evidence in the record suggesting the existence of a condition which could have a material impact on the disability decision requiring further investigation.”<sup>28</sup>

Listing 12.05 defines mental retardation as “significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period.”<sup>29</sup> Plaintiff points to evidence that he may meet this IQ requirement, including that he only went to school until ninth grade, was in special education classes from third grade to ninth grade due to learning disabilities, and was unable to join the military because he could not pass the aptitude test. Plaintiff was examined by a psychologist who determined plaintiff had low-average intelligence but retained common sense judgment, yet the psychologist did not perform any tests on plaintiff. This is insufficient evidence to determine whether plaintiff meets this requirement of Listing 12.05C.

Plaintiff meets the second part of Listing 12.05C in that he has an additional and significant work-related limitation of function.<sup>30</sup> This is met when a claimant has a severe impairment in addition to his mental impairment.<sup>31</sup> The ALJ determined plaintiff’s degenerative disc disease was severe. Therefore on remand, the ALJ should order a consultative mental examination which includes an IQ test. The ALJ must then reexamine plaintiff’s severe impairments, and determine whether the impairments cause plaintiff to meet or equal a Listed Impairment.

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<sup>28</sup>*Id.* at 1167.

<sup>29</sup>Appendix 1, Subpart P of 20 C.F.R. Part 404, § 12.05

<sup>30</sup>Appendix 1, Subpart P of 20 C.F.R. Part 404 § 12.05C.

<sup>31</sup>*Hinkle v. Apfel*, 132 F.3d 1349, 1352-53 (10th Cir. 1997).



### *B. Assessment of Plaintiff's Credibility*

Plaintiff asserts that the ALJ erred in failing to properly assess the credibility of his subjective complaints. When determining whether a claimant's subjective complaints are credible, the ALJ must consider the objective medical evidence and such factors as: the claimant's persistent attempts to find relief and his willingness to try any treatment prescribed; whether the claimant has regular contact with a doctor; the claimant's daily activities; and the dosage, effectiveness, and side effects of the claimant's medication.<sup>32</sup> The ALJ must give specific reasons for rejecting a claimant's subjective complaints.<sup>33</sup> Ultimately, credibility determinations "are peculiarly the province of the finder of fact," and should not be upset if supported by substantial evidence.<sup>34</sup>

A review of the ALJ's decision reveals that he adequately supported his finding that plaintiff was not fully credible. The ALJ considered the medical evidence and plaintiff's daily activities, the lack of side effects or ineffectiveness of his medication, his demeanor at the hearing compared to his testimony regarding pain, and inconsistencies in his testimony about his inability to read or write and his ability to fill out forms in the record. Plaintiff argues that the ALJ failed to discuss the precipitating and aggravating factors of plaintiff's pain; however, the ALJ is not required to discuss each and every credibility factor in his decision.<sup>35</sup>

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<sup>32</sup>*Barnett v. Apfel*, 231 F.3d 687, 690 (10th Cir. 2000) (citing *Luna v. Bowen*, 834 F.2d 161, 165-66 (10th Cir. 1987)).

<sup>33</sup>*White v. Massanari*, 271 F.3d 1256, 1261 (10th Cir. 2001) (citing *Kepler v. Chater*, 68 F.3d 387, 390-91 (10th Cir. 1995)).

<sup>34</sup>*Id.* (citing *Kepler*, 68 F.3d at 390-91).

<sup>35</sup>*Thompson v. Sullivan*, 987 F.2d 1482, 1490 (10th Cir. 1993).

Plaintiff argues that the ALJ improperly characterized his activities of daily living. The ALJ noted that plaintiff testified at the May 1, 2003, hearing that he spends most of the day in his room, he cannot do much, and his girlfriend helps him out with things such as tying his shoes, cooking, and cleaning. The ALJ also noted that on April 15, 2002, plaintiff told an evaluating psychologist that his daily activities included doing “laundry and that sort of thing,” making food for lunch and dinner, watching television, and caring for his girlfriend’s youngest son, including getting him ready for school.

The ALJ compared this testimony and statements with the activities of daily living questionnaire filled out on November 26, 2001. The ALJ noted that the questionnaire stated that plaintiff cooked, cared for his girlfriend’s children, watched television, fished and visited family and friends. The Court notes that while the questionnaire stated that plaintiff cooks, it also stated that his girlfriend does most of the cooking. And while it stated that plaintiff took care of the children, it also stated that he mainly just “watched over” them. Thus, the questionnaire and statements made to the psychologist indicated that plaintiff was more active than he reported at the hearing.

Moreover, the ALJ discredited plaintiff’s testimony that he had a high level of dependency, finding that such could not be attributed to any medical problem. The ALJ noted that the activity levels on the questionnaire and the psychologist’s report, recorded during the period when plaintiff alleged he was disabled, may not have translated directly into the ability to work, but suggested that plaintiff retained the endurance for full time work.

Plaintiff also argues that the ALJ improperly rejected plaintiff’s allegations of severe back pain merely because plaintiff sat relaxed in a chair throughout the hearing. The ALJ’s observation at the hearing was inconsistent with plaintiff’s evaluation of his pain. Plaintiff claimed that all day long, his pain

was at a level of 8 or 9 points, on a scale of 1 to 10, with 10 signifying excruciating pain. While an ALJ may not reject a claimant's complaints of pain on the basis of demeanor alone,<sup>36</sup> the ALJ's determination was based on a number of factors. It was certainly appropriate for the ALJ to rely on plaintiff's demeanor at the hearing, among other factors.<sup>37</sup>

In short, the ALJ considered the entire record, set forth the specific evidence he relied upon, applied the correct legal standards in evaluating plaintiff's testimony, and based his determination on substantial evidence in the record as required. Because credibility determinations are ultimately left to the ALJ when he has substantial evidence for his decision, the Court finds that the ALJ's decision regarding plaintiff's credibility is not erroneous.

### *C. RFC Determination*

Plaintiff contends that the ALJ failed to properly determine his RFC, by not assessing his ability to perform work related activities on a regular and continuing basis, other than to say plaintiff's impairments would not preclude "light work." But the ALJ more specifically found that plaintiff could do work:

which requires lifting/carrying and/or pushing/pulling 20 pounds occasionally and 10 pounds frequently, sitting for up to 6 hours in an 8-hour workday, and standing and/or walking for up to 6 hours of an 8-hour workday (45 minutes at a time). The claimant could not perform activities requiring climbing ladders/rope/scaffolds or more than occasional stair climbing, balancing, stooping, kneeling, crouching, or crawling. In addition, the claimant's math and reading level skills are at a 4th grade level, and he could not perform work that was not unskilled or simple, routine, and repetitive in nature.

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<sup>36</sup>*Teter v. Heckler*, 775 F.2d 1104, 1106 (10th Cir. 1985).

<sup>37</sup>*See Barnett v. Apfel*, 231 F.3d 687, 690 (10th Cir. 2000); *Schaal v. Apfel* 134 F.3d 496, 502 (2nd Cir. 1998).

The ALJ performed a complete assessment of plaintiff's ability to perform sustained work activities as required by Social Security Ruling (SSR) 96-8p.

Yet the ALJ failed to follow SSR 96-8p by not supporting his RFC determination with substantial evidence. While the ALJ may have properly addressed plaintiff's abilities at each work activity, he did not have substantial evidence for this determination. It is the ALJ's duty to determine RFC, but he must support his decision with substantial evidence and explain his reasons for his decision.<sup>38</sup> When assessing RFC, the ALJ must:

include a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts (e.g., laboratory findings) and nonmedical evidence (e.g., daily activities, observations). In assessing RFC, the adjudicator must discuss the individual's ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule), and describe the maximum amount of each work-related activity the individual can perform based on the evidence available in the case record. The adjudicator must also explain how any material inconsistencies or ambiguities in the evidence in the case record were considered and resolved.<sup>39</sup>

Here the ALJ mentioned many test results from plaintiff's medical records and noted that one of plaintiff's physicians said that plaintiff's condition should improve with physical therapy. Yet the ALJ did not list any evidence that explained his findings regarding plaintiff's ability to perform work activities. No physician or medical expert has defined plaintiff's capabilities for lifting, walking, standing, sitting, or any of the exertional or nonexertional work-related activities. In fact, there is no evidence relating specifically to what plaintiff can and cannot do physically, aside from his own testimony, which the ALJ

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<sup>38</sup>See *Cole v. Barnhart*, 293 F. Supp. 2d 1234, 1242 (D. Kan. 2003).

<sup>39</sup>Soc. Sec. Rul. 96-8p, 1996 WL 374184, at \*7.

rejected.<sup>40</sup> None of plaintiff's doctors has defined the level at which he can perform work or stated his abilities and limitations with respect to performing physical work activities.<sup>41</sup> Because of this, the ALJ was not in a position to make any RFC determination; there is no evidence in the record to support such a finding.<sup>42</sup>

Because of the non-adversarial nature of the proceeding, and the ALJ's duty to develop the record, when the ALJ found no substantial evidence on which to base his RFC determination, he should have recontacted plaintiff's physicians and obtained any additional records the physicians may have had.<sup>43</sup> If additional records did not exist or were insufficient to determine RFC, then the ALJ should have ordered a consultative exam.<sup>44</sup>

## **V. Conclusion**

Therefore, the Court finds that this action should be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to conduct further proceedings as follows:

Upon receiving the court's final order of remand, the Appeals Council of the Social Security Administration will remand this case and direct the ALJ to reassess the severity of plaintiff's impairments in accordance with the statutes and regulations. The ALJ should order a mental status examination including an IQ test. The ALJ must then reexamine whether any of plaintiff's mental impairments are severe and determine whether any of the severe impairments meet or equal a Listed Impairment, including

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<sup>40</sup>*See Baker v. Barnhart*, 84 Fed. Appx. 10, 14, 2003 WL 22905238, \*3 (10th Cir. 2003). Pursuant to 10th Cir. Rule 36.3(B)(1), the court cites this unpublished opinion for its persuasive value.

<sup>41</sup>*See id.*

<sup>42</sup>*See id.*

<sup>43</sup>*Id.* at 14, \*4 (citing *White v. Barnhart*, 287 F.3d 903, 908 (10th Cir. 2001); *Baker v. Bowen*, 886 F.2d 289, 292 (10th Cir. 1989); 20 C.F.R. § 404.950(d)(1)).

<sup>44</sup>*Id.* (citing 20 C.F.R. §§ 404.1512(f), 404.1593a(a)(1); 42 U.S.C. § 423(d)(5)(B)).

Listing 12.05C. In addition, if plaintiff's impairments do not meet or equal a Listing, the ALJ should redetermine plaintiff's RFC by either obtaining additional evidence from plaintiff's treating physicians or ordering a consultative examination. The ALJ must then state the specific evidence he relies on to determine plaintiff's capability in each work-related activity. After the ALJ reassesses plaintiff's RFC, he must redetermine plaintiff's resulting ability either to return to his past work or to perform other work in the economy.

**IT IS THEREFORE ORDERED BY THE COURT THAT** defendant's decision denying plaintiff disability benefits is **REVERSED AND REMANDED** pursuant to the fourth sentence of 42 U.S.C. § 405(g) for further proceedings in accordance with this Memorandum and Order.

**IT IS SO ORDERED.**

Dated this 13<sup>th</sup> day of August, 2004, at Topeka, Kansas.

S/ Julie A. Robinson  
Julie A. Robinson  
United States District Judge